

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

KEISON HARRY,
Appellant

v.

DOCKET NO.: G1-07-310

BOSTON POLICE DEPARTMENT,
Respondent

Appellant:

Anthony R. Ellison, Atty.
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Appointing Authority:

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Commissioner:

Daniel M. Henderson

DECISION

Pursuant to the provisions of G.L. c. 31, s. 2(b), the Appellant, Keison Harry, (hereinafter "Appellant" or "Harry") seeks review of the Human Resources Division's (hereinafter "HRD") decision in accepting reasons proffered by the Respondent-Appointing Authority, Boston Police Department (hereafter, "Department", "Appointing Authority" or "BPD"), for the bypass of the Appellant for original appointment to the position of Boston police officer. The reasons proffered for the bypass and accepted by the Human Resources Division was that the Appellant was deemed psychologically unfit for

appointment as a Boston police officer. The BPD's determination of psychological unfitness was based substantially on the opinion of Dr. Julia M. Reade. The Appellant filed a timely appeal at the Civil Service Commission (hereinafter "Commission") A full hearing was held on June 9, 2009 at the offices of the Commission. Two audio tapes were made of the full hearing. Both parties filed post-hearing proposed decisions.

FINDINGS OF FACT

Thirty-three (33) exhibits and a stipulation of facts were entered into evidence, Exhibit 33 being the HRD document packet filed at the Commission. The BPD objected to Appellant's submitted Exhibit 13. Based upon the documents entered into evidence and the testimony of:

For the Appointing Authority:

- Dr. Julia M. Reade

For the Appellant:

- Keison Harry, Appellant

I make the following findings of facts:

1. The Appellant having taken and passed a civil service exam in the spring of 2007, his name appeared on Certification #270048, dated 7/26/2007 for the position of Boston Police officer. (Exhibit 1 and stipulation)
2. The Appellant applied for a position with the Boston Police Department and met with the Department's Recruit Investigations Unit. He provided the Department with his extensive and detailed Student Officer Application with numerous other required documents attached, including past employment records, three "Personal Letter of Reference Forms", a "Life Relationship" Form, and three "Supervisor

Forms". As required, his Student Officer Application was verified, sworn, signed, with a notarized signature by the Appellant, and submitted on February 10, 2007. (Exhibit 2)

3. The Appellant received outstanding references and evaluations from all of the contacts made by the BPD-RIU Investigator. All of his prior employers, personal references and supervisors, including Allen Platt- Youth Center Director for the City of Cambridge who has known the Appellant for 12 years. Selwin Chambers III Director of Youth Development and Family Services for the Boston Centers for Youth & Families, who has known the Appellant for 5 years. Paul Ryder- Director of Recreation for The City of Cambridge, who has known the Appellant for 6 years. He received outstanding references from his supervisor Vanthomas Straughter- Asst. Chief Probation Officer at Dorchester District Court and from many others. (Exhibits 2, 21,22, 23, 24, 25, 26, 27, 28, 29, 30)
4. A Detective from the Boston Police Department Recruit Investigations Unit (RIU) undertook a thorough investigation into the Appellant's background and the Detective compiles a summary report of his investigation. The Appellant passed the BPD background check. (Exhibit 2 and testimony of Dr. Reade)
5. The BPD extended a conditional offer of employment to the Appellant, contingent upon his successful completion of the medical and psychological screening component of the hiring process. (Testimony of Dr. Reade)
6. Under the ADA, a disability is: (A) a physical or mental impairment that substantially limits one or more of the major life activities . . . (B) a record of such an impairment; or (C) **being regarded as having such an impairment.**.,(Emphasis

added) 42 U.S.C. §§ 12102(2)(A) and Krocka v. City of Chicago, 203 F.3d 507 (7th Cir., 2000) (Administrative notice)

7. A conditional offer of employment is a legal term of art developed under the Massachusetts anti-discrimination laws, M.G.L. c. 151B, as well as the federal Americans with Disabilities Act (ADA). Specifically, under these statutes, an employer may not require that an applicant undergo a medical examination prior to making that individual a conditional offer of employment. Most relevantly, G.L. c. 151B provides: “An employer may not make pre-employment inquiry of an applicant as to whether the applicant is a handicapped individual or as to the nature or severity of the handicap, except that **an employer may condition an offer of employment on the results of a medical examination conducted solely for the purpose of determining whether the employee, with reasonable accommodation, is capable of performing the essential functions of the job...**” G.L. c. 151B §4(16) (emphasis added, administrative notice)
8. On June 25, 2007, the BPD’s Robin Hunt sent a bypass letter to HRD notifying it that the Appellant was being bypassed for appointment on the basis of the second opinion psychiatric review and interview with Dr. Julia Reade. The Appellant was found unqualified for appointment, on the finding of Dr. Reade that: “In summary, Mr. Harry’s presentation and history suggest a pattern of impulsivity, poor planning and difficulty considering the consequences of his choices. He justifies his actions as driven by external necessity and appears self-preoccupied, unrelated and self-justifying. He becomes strikingly irritable when thwarted, and appears burdened and overwhelmed by his current responsibilities. These factors appear to

be ingrained and longstanding personality traits.” The letter goes on to state that:

“Given the highly stressful nature of urban police work, the Boston Police Department is unable to provide Mr. Harry with a reasonable accommodation.”

(Emphasis added) (Exhibits 1 & 33)

9. On September 17, 2007, HRD’s Jenifer Murphy sent the Appellant a letter notifying him that HRD had found the BPD’s stated reasons for bypass to be acceptable. The letter also notified the Appellant of his right to appeal this decision to the Civil Service Commission. (Exhibit 33)
10. The BPD selected 75 candidates for appointment from the eligibility list, Certification # 270048, of which the names of 39 of those candidates selected appeared lower on the Certification than the Appellant. The BPD employment date for those selected candidates was June 25, 2007. (Stipulation and Exhibit 33)
11. The Commonwealth’s personnel administrator (HRD) [HRD regulations] has established Regulations for Initial Medical and Physical Fitness Standards for Municipal Public Safety Personnel HRD regulations, for police officers, establish two disqualifying categories of psychiatric medical conditions:
 - “Category A Medical Condition” is a “condition that would preclude an individual from performing the essential functions of a municipal police officer or present a significant risk to the safety and health of that individual or others.” Category A “psychiatric” medical conditions include “disorders of behavior, anxiety disorders, disorders of thought, disorders of mood, disorders of personality”.
 - “Category B Medical Condition” is a “condition that, based on its severity or degree, may or may not preclude an individual from performing the essential functions of a municipal police officer or present a significant risk to the safety and health of that individual or others.” Category B “psychiatric” medical conditions include “a history of any psychiatric condition, behavior disorder, or substance abuse problem not covered in Category A. Such history shall be evaluated based on that individual’s history, current status, prognosis, and ability to respond to the stressors of the job” and “any other psychiatric

condition that results in an individual not being able to perform as a police officer.” (administrative notice:(HRD) Regulations for Initial Medical and Physical Fitness Standards for Municipal Public Safety Personnel).(administrative notice)

12. On or about June 2004, the BPD submitted a psychological screening plan, (“BPD Plan”) to the Human Resources Division (HRD) for approval. (Exhibit 9)
13. On or about July 2004, Sally McNeely, the Director of the Organizational Development Group of the Human Resources Division of the Commonwealth of Massachusetts, approved the psychological screening plan submitted by the Boston Police Department. (Exhibit 9)
14. As stated in the BPD Plan, “[T]he goal of the proposed psychological screening process is to identify candidates who may exhibit any evidence of a mental disorder.... This process will be used to detect through a review of the background investigation, personal history as provided by the candidate, psychological testing, interviews, and *any psychological or behavior characteristics*, which would significantly interfere with the candidate’s successful performance of the essential functions and duties of the position of Boston Police Officer.” (Exhibit 9)
15. No specific instructions are given to the psychiatrists conducting the first and second level clinical interviews pursuant to the Plan with respect to what information and/or documents may be relied upon. Dr. Scott and Dr. Reade must abide by the Plan in conjunction with their training and experience and utilize the standards set forth by the laws of the Commonwealth (G.L.c.31, §61A and regulations promulgated by HRD pursuant thereto) to determine the psychiatric

fitness to perform the duties or manage the stresses of an armed police officer.
(Exhibit 9)

16. The BPD's approved Psychological Screening Plan consists of three phases. During Phase I of the Plan, all candidates are administered two written psychological tests, the Minnesota Multiphasic Personality Inventory-2 Exam (hereinafter "MMPI-2") and the Personality Assessment Inventory Exam (hereinafter "PAI"). (Exhibit 9)

Phase I - Written Psychological Tests

17. The MMPI-2 is a 567 question, paper and pencil psychometric test. It was "normed" on a combination of clinical populations and non-clinical populations initially to diagnose psychological conditions; however, as the test was further researched, researchers have been successful in ferreting out even more personality characteristics based on how a person responded on the test. The test results provide information about how the applicant has approached the test and also highlight both enduring personality traits and more acute problems that the candidate is experiencing. (Exhibit 3, Testimony of Dr. Reade)
18. On April 21, 2007, the Appellant was administered the MMPI-2 test. A proprietary "Law Enforcement Interpretive Report" or comparative profile is generated by computer, based on the test results. (Exhibit 3, Testimony of Dr. Reade)
19. The "Law Enforcement Interpretive Report" relays that: the Appellant responded to the MMPI-2, with "the L scale as a prominent score. His MMPI-2 profiles may underestimate his problems." "The relatively low MMPI-2 profiles he obtained do not indicate psychological conflicts or stresses that he considers to be producing

great problems for him at this time. No emotional maladjustment can be seen in his profile.” “He appears to be generally comfortable in social situations. Such individuals tend to have little trouble meeting and talking with other people. “He views his home life as pleasant and supportive.” “His MMPI-2 clinical and content scale scores are elevated at or below a T score of 59. Profiles like this occur in 21.26% of the normative sample of men. A high percentage (60.01%) of male law enforcement applicants produce a profile in this range.” And finally; “No contemporary personnel base rate information for normal-range clinical profiles like this one.” (Exhibit 3)

20. Dr. Reade testified that the Appellant’s score also indicated that the Appellant might be “somewhat intolerant and insensitive, and others may view him as rather crude, coarse and narrow-minded.” (Exhibit 3 and testimony of Dr. Reade)

21. Dr. Reade testified that the BPD also uses the computer generated “Extended Score Report” or ERS for comparison to averages of a group for indications of “content themes” in the testing results. Dr. Reade found indications that: his answers reflected “trouble with admitting wrong or apologizing.” The Appellant also gave himself “an overly favorable self-appraisal.” “Had he responded more openly, it is likely that he would have endorsed more symptoms.” However, Dr. Reade concluded in her report that although he “responded defensively to the MMPI, but the results were largely unremarkable.” (Exhibits 3 & 8, testimony of Dr. Reade)

22. On April 21, 2007, the Appellant was also administered the Personality Assessment Inventory exam (“PAI”) and subsequently a PAI Law Enforcement, Corrections and Public Safety Selection Report, an interpretive report generated by computer.

This Report cautions under **Interpretive Caveats** that: “A comprehensive personal history questionnaire and a structured interview focused on job-relevant behavior are recommended. The hiring authority’s final screening decision should be based on corroborating information gathered from multiple data sources.”(Exhibit 4)

23. The PAI is a 344 question, written multiple choice test that also examines different domains of personality functioning. The PAI has been “normed” against the general population and against different gender groups, different ethnic groups, and also against post-probationary public safety officers. Because of this, the PAI results allow for interpretive comparisons to be made of the applicant to other applicants who have passed through to the point of being probationary candidates. (Exhibit 4, testimony of Dr. Reade)

24. The PAI is a multiple choice test that also examines different domains of personality functioning. The PAI has been “normed” against the general population and against different gender groups, different ethnic groups, and also against post-probationary public safety officers. Because of this, the PAI results allow for comparisons to be made of the applicant to other applicants who have passed through to the point of being post-probationary officers. (Testimony of Dr. Reade)

25. Dr. Reade testified that the test questions, through some language or cultural confusion cause mistakes or “misreading or over reading” of questions. She admitted that since she is not a “psychologist” she is “quite cautious” and uses the test results as a guide post for her interview or the background of the candidate. She looks for a “content theme” in the test. The PAI results indicated certain content

themes to her; e.g. that the Appellant has a tendency toward somatization, which is a condition whereby mental problems tend to manifest themselves physically, paranoia, and subscales related to resentment or anger or ability to manage stress.. (Exhibit 4 and testimony of Dr. Reade)

Phase II - Evaluation by Dr. Marcia Scott

26. On April 23, 2007, the Appellant moved onto Phase II of the Psychological Screening and met with Dr. Marcia Scott, a Department Psychiatrist, who conducted a 40 minute, first level psychiatric interview-evaluation, pursuant to the Boston Police Department psychological screening plan. (Exhibit 7)
27. Prior to the interview, Dr. Scott reviewed some of the Appellant's background documents, his MMPI-2 test scores/results, and his PAI test scores/results. (Exhibit 7)
28. Dr. Scott made apparent notes of her evaluation of the Appellant. She indicated that the Appellant arrived early and appeared sloppy and agitated. She noted, "[h]e rushed in, greeting me as if he wanted to get the unpleasant experience over with. He never smiled or looked directly at me. He is very obese his belly coming out from between the buttons of his work shirt. (Exhibit 7)
29. Dr. Scott also noted that the Appellant "was truculent and impatient from the beginning of the interview. He gave perfunctory answers and when asked to think about his reasoning he became annoyed, seemed burdened and expressed how burdened he feels by his life." And, that "In one restrained tirade..." and elsewhere that "He responded with a subdued tirade..." and "He is fatigued and has difficulty thinking clearly.", etc. (Exhibit 7)

30. When asked about any physical problems, Dr. Scott noted that the Appellant's statement that "[i]t doesn't do any good that I keep gaining weight," reflected an attitude that he had no role in the problem. (Exhibit 7)
31. Dr. Scott stated that the Appellant generally cannot "reflect on his behavior and actions." He blamed the world in general, blamed someone else or gave a long irritated description of how hard his life is but took no responsibility." Further, Dr. Scott noted that the Appellant "could not focus on more than one thing at a time and tended to show how responsible he was by telling [Dr. Scott] that he had not done something because he 'had to be responsible' for something else." (Exhibit 7)
32. Another conclusion for Dr. Scott was that the Appellant approached "issues based on his immediate needs with little awareness of others perspective or needs." (Exhibit 7)
33. Dr. Scott was also noted concerns with the Appellant's statements that he had no other problems or had not been fired from a job when he had been fired from a job as a security guard with the City of Boston. The Appellant explained, "I had a baby I had to take care of, my girlfriend was having trouble." When Dr. Scott asked if he had made arrangements to take time off, Dr. Scott claimed the Appellant answered, "[t]hey knew I was having a baby." (Exhibit 7)
34. In her conclusion, Dr. Scott described the Appellant as "irritable and appears agitated and overburdened." She also noted that "at this time he appears moderately depressed, has difficulty thinking clearly. He has difficulty focusing or thinking through problems and responds impulsively. He is also self-absorbed and copes with longstanding patterns of irresponsibility and blaming. He feels justified

by his feelings without regard for rules or others.” Dr. Scott concluded that these mental defects and coping traits rendered the Appellant unqualified. (Exhibit 7)

35. Then, Dr. Scott, based on her conclusions, referred the Appellant on to Dr. Julia M. Reade to undergo a Second Opinion Psychiatric Review, pursuant to Phase III of the B P D’s psychological screening plan. (Exhibit 7)

36. Dr. Scott’s notes are claimed observations, conversations and conclusions which are substantially subjectively measured appraisals or characterizations which have been untested by cross-examination. (Exhibit 7)

37. I also find, that Dr. Scott’s notes do reflect a certain pre-disposed negativity or criticism toward the Appellant. Dr. Scott’s report has clear overtones of adversity or confrontation on her part. I find it suspect that Dr. Scott could zero in on issues like his loss of a job due to sick time use for the birth of his child and a problem pregnancy or a house fire which occurred when he was 13 years old; after he had disclosed it all completely on the BPD student officer application or medical questionnaire with other supporting records. Yet, Dr. Scott otherwise glossed over the rest of his excellent and industrious education-employment history and written references in her interview and evaluation. He is an inner city black male who graduated on time from a suburban high school and went on to graduate from college. The Appellant had passed the BPD background investigation; yet, Dr. Scott seems to be searching for something in his background, on which to base her determination of him being unqualified or non-disclosing. The negative focus and slanting in Dr. Scott’s report indicates a pre-disposition to disqualify him and send

him on to Dr. Reade for a second level review. (Exhibits 7 & 8 reasonable inference)

38. Dr. Scott as a first level interviewer and Dr. Reade as the second level interviewer for the BPD have worked together for approximately 5 years. Dr. Reade does not interview a candidate unless he or she has failed Dr. Scott's interview-evaluation. Dr. Reade holds Dr. Scott in "high regard". This creates an expectation or predisposition on the part of Dr. Reade. Dr. Reade also reviews Dr. Scott's report of unfitness prior to her own interview of the candidate. (Exhibit 7, testimony of Dr. Reade, reasonable inference)
39. Although, Dr. Scott did not testify at this hearing. I draw no adverse inference from this fact alone as no subpoena was requested and Dr. Scott's availability to testify is unknown. However, it is noted that Dr. Scott's supposed report is not signed by her or otherwise authenticated as her report. On balance, it is recognized that the BPD appears to have followed its approved psychological prescreening plan and Dr. Scott's interview-evaluation was an integral part of that plan. It is also recognized that therefore, it was reasonable for the BPD and Dr. Reade to rely on and employ Dr. Scott's report in the prescreening process, but not as a report of verified or corroborated facts. Accordingly, for all of these stated reasons, while Dr. Scott's notes are accepted in evidence, except for facts that are supported by other credible evidence, I give her observations or conclusions little weight. (Exhibits 7 & 8)
40. Since Dr. Scott opined that the Appellant was not psychologically fit to become a Boston Police Officer, the Appellant was referred to Dr. Julia M. Reade to undergo

a Second Opinion Psychiatric Review, pursuant to Phase III of the BPD's psychological screening plan. (Exhibits 7 & 9)

Phase III - Evaluation by Dr. Julia Reade

41. Dr. Reade is a Board Certified psychiatrist who has worked for the Department for almost 10 years conducting Second Level Psychiatric Interviews for police officer recruits. She is Board Certified in General Psychiatry and Forensic Psychiatry and has extensive experience in Law and Psychiatry as well as Occupational Psychiatry. (Testimony of Dr. Reade)
42. Dr. Reade conducts Second Level Psychiatric Screening interviews when Dr. Scott deems an applicant as not psychologically fit to be a Boston police officer and when an applicant was psychologically bypassed in the past. (Testimony of Dr. Reade)
43. Dr. Reade explains to each candidate that, even though she has been hired by the City of Boston and even though she is reviewing what Dr. Scott has sent to her, she is obligated to be as objective and as careful as possible and that even though the recruit is coming to see her for a second opinion, everyone gets a fresh look. Dr. Reade has disagreed with Dr. Scott's opinion in the past, from 0% to 25%, depending on the police academy class in question. Dr. Reade considers her evaluation to be "independent" from that of Dr. Scott. (Testimony of Dr. Reade)
44. Dr. Reade reviewed Dr. Scott's report prior to interview with the Appellant. Dr. Reade quoted Dr. Scott's entire report conclusion verbatim in her own report at page 2. Dr. Reade also made numerous observations and conclusions in her own

report that were identical or very similar to those reported by Dr. Scott. (Exhibits 7 & 8, testimony of Dr. Reade)

45. Dr. Reade testified that the Department's Psychological Screening Process is in place because the Boston Police Officer position is a complicated job, a high stakes job, that requires autonomy, the ability to get along well with others, adjust to difficult circumstances, review and be accountable for your own behaviors, adjust to a hierarchal structure, be flexible, deal with very high levels of stress and deal with high levels of boredom. She also testified that the process is important to protect the safety of the general public; the safety of the actual recruit/police officer; the safety of their partner(s); and the reputation of the Department. (Testimony of Dr. Reade)

46. Prior to the clinical evaluation, Dr. Reade reviewed only some of the Appellant's background documents sent to her by the BPD, which included the recruit investigation summary report and personal data questionnaire, Dr. Scott's report and his MMPI-2 and PAI test scores/results. (Testimony of Dr. Reade)

47. Dr. Reade used the MMPI-2 and the PAI to help focus her inquiry during her interview with the Appellant. (Testimony of Dr. Reade)

48. Dr. Reade did not base her recommendation to bypass solely on the Appellant's MMPI-2 and PAI test results, nor would she ever do so. (Testimony of Dr. Reade)

49. Dr. Reade analyzes the test results, the MMPI-2 and PAI, with caution. She looks at how someone approached the test, whether the person was defensive, how willing was the person to disclose information. She reads through the computer narrative reports of the tests to see if there are any issues that are flagged as

particular concerns and she focuses on those areas in the clinical interview.

(Testimony of Dr. Reade)

50. Prior to her interview with each candidate, Dr. Reade also reviews the documents sent to her by the BPD. She reviews the summary report from the investigating detective and the personal data questionnaire. It is noted that the summary report of the investigating detective is not in evidence. It is also noted that the BPD Student Officer Application, which is in evidence, (Exhibit 2), is not one of the documents received and reviewed by Dr. Reade prior to interview of the Appellant.

(Testimony of Dr. Reade)

51. Dr. Reade typically spends an hour with the candidate. She realizes that everybody is nervous and they are worried because the stakes are very high and a lot of recruits have never met with a psychiatrist before. Everyone comes in with some level of nervousness and she is looking at how the person handles the stress of that situation – whether he is able to keep command of himself and manage the interaction in a way that gives the doctor confidence in his ability to handle stressful situations. (Testimony of Dr. Reade)

52. Dr. Reade conducts her interview in semi-structured fashion, always with the focus on whether the candidate is a good fit to be a Boston Police officer. She looks at a series of domains, to include a candidate's life experiences, their problem solving skills, interest in police work, communication, interpersonal relationships, and community. This is a standardized methodology for pre-screening public safety candidates, with a focus on job specific domains. (Testimony of Dr. Reade)

53. Dr. Reade testified that the clinical evaluation is an important step in the Department's screening process. There are issues that arise in the test and/or in the candidate's background that Dr. Reade would like to ask the candidate about. She wants to gain an understanding as to why the candidate answered questions in a particular way on the test or, relative to the candidate's background, why the candidate made particular choices in his life. The purpose of this questioning is to gain an understanding of what the context of the trait or behavior at issue is.

(Testimony of Dr. Reade)

54. Dr. Reade is looking to see if the candidate can not only give a coherent account of what has happened in his life, but is looking to hear the candidate's thoughts about what has happened, whether the candidate is willing to take any responsibility for unfortunate events in his life, whether the candidate has learned from his experiences, and how the candidate solves problems, etc. She stresses that a police officer must have the ability to make split second decisions and must be able to learn from any missteps along the way. An officer must have the ability to analyze his past actions and must do so in an honest manner. (Testimony of Dr. Reade)

55. Dr. Reade recounted her interview with the Appellant, which took place on April 26, 2007. She indicated that the Appellant was on time and agitated. "He dropped everything he was holding onto the floor on his way into my office and began to speak." (Exhibit 8 and testimony of Dr. Reade)

56. Dr. Reade reported that Mr. Harry made "little eye contact and appeared irritable and self-justifying. Mr. Harry could barely contain himself as he complained about his referral for a second psychiatric opinion, expostulating that his past 'mistakes'

related to driving infractions, his payment defaults and job termination did not reflect a pattern of irresponsible behavior as Dr. Scott had inferred.” She found that Mr. Harry cataloged “the difficulties he had encountered and the competing demands he had tried to manage” and he “appeared completely overwhelmed and barely able to cope.” (Exhibit 8 and testimony of Dr. Reade)

57. Dr. Reade reported that Mr. Harry was difficult to engage during the interview and he made “little to no eye contact and was strikingly unrelated. He rattled on, telling what seemed like a practiced narrative about the genesis of his interest in police work, without any indication that he was even aware that there was another person in the room or that he had long ago answered my question.” (Exhibit 8 and testimony of Dr. Reade)

58. Dr. Reade reviewed the Appellant’s MMPI-2 scores. She believed that the Appellant had responded defensively and it therefore likely suppressed his clinical scales. The content levels noted in the MMPI-s indicated the Appellant’s rigidity, inflexibility and an unusual sensitivity to criticism. The Appellant endorsed critical items in the test indicating for example: acute anxiety, anti-social attitudes, sexual concern, depression, sleep disturbance and untrusting nature, etc. (Testimony of Dr. Reade)

59. The Appellant’s results also indicated a mild elevated level of cynicism that shows his tendency to get in trouble with peers in his personal life and in his professional life. (Testimony of Dr. Reade).

60. Dr. Reade also reviewed the PAI scores and compared to a normed sample of post-probationary public safety officers, he showed significant elevation in the domains:

somatization, where he converts stress into physical symptoms; paranoia, and stress, and on subscales related to resentment and antisocial behaviors. The Appellant's PAI results also indicate that he may suffer from anger, impatience, problems with his relationship, stress and anxiety. (Exhibit 8, testimony of Dr. Reade)

61. Dr. Read felt that the PAI results indicated a "moderate likelihood of a 'poorly-suited' rating, high likelihood of job related, integrity, anger management, and substance abuse problems." (Exhibit 8 and testimony of Dr. Reade)
62. Dr. Reade found the Appellant dismissive about his parents' marital difficulties or any conflict with his girlfriend. He was also dismissive and vague about the difficulties in his own past, including disciplinary infractions in school or regarding his juvenile court appearance. (Exhibit 8 and testimony of Dr. Reade)
63. Dr. Reade claimed that at the end of the interview, the Appellant gave her a long speech about his worthiness for the police academy that was manipulative and coercive: "I would like to go through the process and I don't want this to hinder me. You see today, I am a responsible individual- hopefully you've learned in the time together that I'm a responsible, decent young man. Hopefully you don't see anything wrong psychologically." (Exhibit 8 and testimony of Dr. Reade)
64. Dr. Reade described her prescreening process as a specific evaluation relating to the tasks of a police officer. It focuses on or is geared to job specific traits or qualities of a police officer. She also looks for any prior psychiatric treatment or medication, drug abuse or any diagnosis of a psychiatric illness.(Testimony of Dr. Reade)

65. Dr. Reade reported that the Appellant denied any psychiatric symptoms or problems with substance abuse. He denied most of the questions he endorsed on the PAI and MMPI, except for the statement "Sometimes I'm too impatient" (Exhibit 8)
66. Although she did not diagnose the Appellant with a Category A or a Category B condition, she believed that he possibly had a Category B condition, an anxiety disorder. (Testimony of Dr. Reade)
67. Dr. Reade admitted that the Appellant having graduated from Scituate High School, a suburban high school, on time in four years had shown responsibility and it was an "impressive achievement". She also believed that his graduation from Grambling State University in La. was another impressive achievement. However, Dr. Reade explained that she focused on adult behavior in her evaluation of "long term character traits". She also admitted that he had "strong" personal and employment references. In her evaluation, she tries "to take all of the data in the totality of the circumstances". Dr. Reade claimed that she had "very robust data" to rely on here. (Testimony of Dr. Reade)
68. Dr. Reade admitted that the written psychological test results are not a predictor of future behavior but only an indicator of "proneness". She testified that psychiatric prescreeners tend to shy away from describing indicators as "within normal range".(Testimony of Dr. Reade)
69. Neither Dr. Scott nor Dr. Reade audio or video record their interviews. (Testimony of Dr. Reade)

70. Dr. Reade's claimed observations, conversations and conclusions are substantially subjectively measured appraisals or characterizations. They are expressed in strong, emphatic, comparative language, with a negative effect. (Exhibit 8, testimony of Dr. Reade)

Conclusion of Dr. Reade

71. Dr. Reade concluded regarding the Appellant's psychological fitness: "In summary, Mr. Harry's presentation and history suggest a pattern of impulsivity, poor planning and difficulty considering the consequences of his choices. He justifies his actions as driven by external necessity and appears self-preoccupied, unrelated and self-justifying. He becomes strikingly irritable when thwarted, and appears burdened and overwhelmed by his current responsibilities. These factors appear to be ingrained and longstanding personality traits." The letter goes on to state that: "Given the highly stressful nature of urban police work, the Boston Police Department is unable to provide Mr. Harry with a reasonable accommodation." (Emphasis added) (Exhibits 1 & 33)

72. Doctor Reade found that the Appellant had indications of a long list of behavior patterns and longstanding personality traits which have been previously listed. She also found the Appellant's "[interview] presentation and history suggest a pattern of impulsivity, poor planning and difficulty considering the consequences of his choices." He appears "self-preoccupied, unrelated and self-justifying." He is "strikingly irritable when thwarted, and appears burdened and overwhelmed by his current responsibilities." (Exhibit 8 and testimony of Dr. Reade)

73. Dr. Reade admitted that she made no diagnosis here and only found longstanding traits or behavior patterns. She claimed that she focused on adult behavior. She looked at the totality of the data on balance. She did not remember specifically why she described the Appellant in her report as “an enormous disheveled man”. She conceded that she has seen candidates with much worse driving records than the Appellant. She also conceded that she could not remember if the Appellant used the exact word “mistakes”, as she reported, in referring to taking responsibility for past incidents. She went on to explain that there are “ways of technically taking responsibility” and ways of taking actual responsibility; the word used is not necessarily determinative but the totality of the presentation and data is determinative. She admitted finding his references “strong” and “very positive”. Dr. Reade also made other concessions under cross-examination. However, despite any concessions she may have made, at the conclusion of her testimony, **Dr. Reade continued to hold to her opinion as stated in her report, that the Appellant did have a pattern of behavior or longstanding psychological traits which rendered him unfit to be a Boston police officer.** (Testimony of Dr. Reade)

Testimony of Appellant

74. The Appellant testified that his interview with Dr. Scott was not a real interview but was confrontational. Dr. Scott referred to all of his explanations as “excuses”. Dr. Scott only wanted to focus on negatives and refused to discuss any positives in his background. He told Dr. Scott that he did not agree with her determination that he was not responsible and shifted blame to other factors. He said that the interview with Dr. Scott did not end well. He was never argumentative, sarcastic or loud

during his interview. He was entirely cooperative, appropriate and professional at the interview, much as he is expected to be as an Associate Probation Officer in the court room. He was neat and groomed; dressed in a suit and tie for the interview, the same as he dresses for work and for this Commission hearing. He estimates that the interview lasted approximately 30 minutes. (Testimony and demeanor of Appellant)

75. The Appellant testified that he was nervous when he began the interview with Dr. Scott but was “extremely nervous” entering the interview with Dr. Reade, because it was a second level. He was holding his wallet as he shook hands with Dr. Reade and cards dropped out of the wallet, on to the floor. He picked up the cards and went into her office. He was very surprised to find his complete file open on Dr. Reade’s desk when he entered her office. He thought that an “independent” interview meant that it was completely fresh and he expected that Dr. Scott and Dr. Reade would only meet afterwards and compare notes. Dr. Reade, like Dr. Scott only focused on negatives and completely ignored all of the positives in his background. She only wanted to talk about the same incidents that Dr. Scott focused on. Dr. Reade repeatedly asked him questions about Dr. Scott’s interview and incidents raised by Dr. Scott. Dr. Reade looked down and wrote notes during nearly the entire interview. He was unable to make eye contact with her. He talked and Dr. Reade looked down, nodded and wrote notes the entire time. He was never argumentative, sarcastic or loud during his interview. He was entirely cooperative, appropriate and professional at the interview, much as he is expected to be as an Associate Probation Officer in the court room. He was neat and groomed; dressed

in a suit and tie for the interview, the same as he dresses for work. He estimates that the interview lasted approximately only 30 minutes, the same as Dr. Scott's. He claimed in his interview that the "isolated incidents" in his past, including the fire when he was a minor, was dismissed in court, his 3 driving infractions and his being fired from a job because of his abuse of sick time, were not substantive or defining issues and "they made them an issue." (Testimony and demeanor of Appellant)

76. The Appellant had previously addressed the only issue that the BPD had raised after his background check. He was called in for an audio-video recorded "Discretionary Hearing" at the BPD-RIU after a "round table" discussion. He was only asked about the City of Boston security job he was terminated from for abuse of sick leave. He explained that his daughter was born in March and his girlfriend, the mother experienced a problem pregnancy and the child experienced complications and both needed pre and post birth care. Numerous hospital visits caused him to take extensive sick leave. However, he had no sick time or medical leave available because he was only a probationary employee, so he was terminated. He gave this explanation to both Dr. Reade and Dr. Scott in the interviews but they would not accept it and claimed he was only making excuses.(Testimony and demeanor of Appellant)

77. The Appellant is a 29 year old black male. He is heavy-set and approximately 5' 10" to 6' tall. He wore a suit and tie and is neat and well groomed. He is polite, straight forward and held up well under cross-examination. He has an easy going likeable manner, is not excitable and seems to be bright. He had appropriate body

language and facial expression. He made good eye contact. At a few short junctures of his testimony he appeared nervous and spoke rapidly. He appears to have a good memory but admitted when he lacked knowledge of a matter, even definitions of words like “disheveled”. He appeared genuinely perplexed by the evaluations of both Dr. Scott and Dr. Reade. He feels that his excellent employment and educational background of achievement and superlative personal and professional references would dispel any concerns about or claimed patterns of irresponsibility and blaming, anxiety, mental deficits, coping traits, impulsivity or poor planning, irritability, being overburdened or any of the other determinations by either Dr. Scott or Dr. Reade. He specifically denied ever displaying any of the traits or behavior patterns noted and claimed by Dr. Reade and Dr. Scott. He explained in detail that the house fire which occurred when he was age 13 was an electrical short-circuit fire caused when his uncle attempted to repeatedly flip on circuit breakers to remedy an electrical problem. The charge was dismissed in court. He also explained that any fatigue he may have periodically felt in the past was probably attributed to simultaneously working two jobs while attending school. He is committed to his objective of becoming a Boston Police Officer and has approached it with the same forthright responsibility he has displayed in his professional and personal life. He took the civil service police officers exam in 2005, 2007 and 2009 and has nearly completed a Masters degree in Criminal Justice at Boston University to achieve that goal. I find the Appellant to be a reliable and credible witness. (Exhibits and testimony, testimony and demeanor of Appellant)

Psychological Evaluation/Report and Resume of Dr. Steven Kaufman, (Exhibit 13)

78. The Appellant offered the psychological evaluation report and resume of Dr.

Steven Kaufman, (Exhibit 13) in to evidence. The BPD objected to its admission.

The Appellant explained that he was unable to call Dr. Kaufman as a witness, as he was “out of the country”. Dr. Kaufman is a licensed clinical psychologist with an extensive practice and impressive resume. The Appellant hired Dr. Kaufman to conduct an evaluation, due to his psychological bypass by the BPD. Dr. Kaufman reviewed the BPD’s MMPI-2 test results along with both the extended score reports and the Law Enforcement Interpretive Reports. Dr. Kaufman also reviewed a separate MMPI report from a test conducted on June 10, 2008 and produced by Dr. Stuart Carter. Dr. Carter is Chief of Psychology at Arbor Health Systems and described as expert in scoring and interpreting of the MMPI. Dr. Kaufman interviewed the Appellant on two occasions, in April and June of 2008. There is no indication in the report that any PAI test results were reviewed. Yet, it is stated that Dr. Kaufman reviewed Dr. Reade’s report but not Dr. Scott’s. His report is dated January 26, 2009. (Exhibit 13)

79. Dr. Kaufman’s report is generally positive and noted that even Dr. Reade found his MMPI was “largely unremarkable”. Dr. Kaufman found the Appellant’s MMPI performance “to all be within normal limits”. Dr. Kaufman also found his overall pattern of work, responsibility and accomplishment to be admirable despite problematic periods. Dr. Kaufman focused on the Appellant’s substantive successes and consistently overcoming obstacles and problems to achieve them as overall indicia in his life. (Exhibit 13)

80. Although, Dr. Kaufman like Dr. Scott did not testify at this hearing; I draw no adverse inference from this fact alone as no subpoena was requested and Dr. Kaufman was apparently out of the country and unavailable to testify. However, Dr. Kaufman was not subject to cross-examination, a critical aspect of the hearing process. Dr. Kaufman's resume is admitted into evidence; on balance, as both Dr. Scott's and Dr. Reade's were admitted. Accordingly, for all of these stated reasons, while Dr. Kaufman's report is accepted in evidence; except for facts that are supported by other credible evidence, I give his observations or conclusions little weight. (Exhibit 13)

CONCLUSION

In a bypass appeal, the Commission must consider whether, based on a preponderance of the evidence before it, the Appointing Authority sustained its burden of proving there was "reasonable justification" for the bypass. E.g., City of Cambridge v. Civil Service Commission, 43 Mass.App.Ct. 300, 303-305, 682 N.E.2d 923, rev.den., 428 Mass. 1102, 687 N.E.2d 642 (1997) (Commission may not substitute its judgment for a "valid" exercise of appointing authority discretion, but the Civil Service Law "gives the Commission some scope to evaluate the legal basis of the appointing authority's action, even if based on a rational ground."). See Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass 256, 264-65, 748 N.E.2d 455, 461-62 (2001) ("The [Civil Service] commission properly placed the burden on the police department to establish a reasonable justification for the bypasses [citation] and properly weighed those justifications against the fundamental purpose of the civil service system [citation] to insure decision-making in accordance with basic merit principles . . . the commission

acted well within its discretion.”); MacHenry v. Civil Service Comm’n 40 Mass.App.Ct. 632, 635, 666 N.E.2d 1029, 1031 (1995), rev.den., 423 Mass. 1106, 670 N.E.2d 996 (1996) (noting that personnel administrator [then, DPA, now HRD] (and Commission oversight thereof) in bypass cases is to “review, and not merely formally to receive bypass reasons” and evaluate them “in accordance with basic merit principles”); Mayor of Revere v. Civil Service Comm’n, 31 Mass.App.Ct. 315, 321n.11, 577 N.E.2d 325 (1991) (“presumptive good faith and honesty that attaches to discretionary acts of public officials . . . must yield to the statutory command that the mayor produce ‘sound and sufficient’ reasons to justify his action”). See also, Bielawski v. Personnel Admin’r, 422 Mass. 459, 466, 663 N.E.2d 821, 827 (1996) (rejecting due process challenge to bypass, stating that the statutory scheme for approval by HRD and appeal to the Commission “sufficient to satisfy due process”)

It is well settled that reasonable justification requires that Appointing Authority actions be based on “sound and sufficient” reasons supported by credible evidence, when weighed by an unprejudiced mind guided by common sense and correct rules of law. See Commissioners of Civil Service v. Municipal Ct., 359 Mass. 211, 214, 268 N.E.2d 346, 348 (1971), citing Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482, 451 N.E.2d 443, 430 (1928). All candidates must be adequately and fairly considered. The Commission has been clear that a bypass is not justified where “the reasons offered by the appointing authority were untrue, apply equally to the higher ranking, bypassed candidate, are incapable of substantiation, or are a pretext for other impermissible reasons.” Borelli v. MBTA, 1 MCSR 6 (1988).

A “preponderance of the evidence test requires the Commission to determine whether, on the basis of the evidence before it, the Appointing Authority has established that the reasons assigned for the bypass of an Appellant were more probably than not sound and sufficient.” Mayor of Revere v. Civil Service Comm’n, 31 Mass. App. Ct. 315, 321, 577 N.E.2d 325, 329 (1991).

The greater amount of credible evidence must . . . be to the effect that such action ‘was justified’ . . . {If [the factfinder’s] mind is in an even balance or inclines to the view that such action was not justified, then the decision under review must be reversed. The review must be conducted with the underlying principle in mind that an executive action, presumably taken in the public interest, is being re-examined. The present statute is different . . . from [other laws] where the court was and is required on review to affirm the decision of the removing officer or board, ‘unless it shall appear that it was made without proper cause or in bad faith.’

Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482, 160 N.E. 427, 430 (1928) (*emphasis added*)

The Commission must take account of all credible evidence in the entire administrative record, including whatever would fairly detract from the weight of any particular supporting evidence. See, e.g., Massachusetts Ass’n of Minority Law Enforcement Officers v. Abban, 434 Mass 256, 264-65, 748 N.E.2d 455, 462 (2001). “Abuse of discretion occurs . . . when a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and improper factors are assessed but the [fact-finder] makes a serious mistake in weighing them.” E.g., I.P.Lund Trading ApS v. Kohler Co., 163 F.3d 27, 33 (1st Cir.1998).

When an Appointing Authority relies on scientific evidence provided through expert witnesses to support the justification for a by-pass decision, the Commission is mindful of the responsibility to ensure: (a) the scientific principles and methodology on which an expert’s opinion is based are grounded on an adequate foundation, either by establishing “general acceptance in the scientific community” or by showing that the evidence is

“reliable or valid” through an alternative means, e.g., Canavan’s Case, 432 Mass. 304, 311, 733 N.E.2d 1042, 1048 (2000) *citing* Commonwealth v. Lanigan, 419 Mass. 15, 641 N.E.2d 1342 (1994); (b) the witness is qualified by “education, training, experience and familiarity” with special knowledge bearing on the subject matter of the testimony, e.g., Letch v. Daniels, 401 Mass. 65, 69-69, 514 N.E.2d 675, 677 (1987); and (c) the witness has sufficient knowledge of the particular facts from personal observation or other evidence, e.g., Sacco v. Roupenian, 409 Mass. 25, 28-29, 564 N.E.2d 386, 388 (1990).¹

Experts’ conclusions are not binding on the trier of fact, who may decline to adopt them in whole or in part. See, e.g., Turners Falls Ltd. Partnership v. Board of Assessors, 54 Mass.App.Ct. 732, 737-38, 767 N.E.2d 629, 634, *rev. den.*, 437 Mass 1109, 747 N.E.2d 1099 (2002). As a corollary, when the fact-finder is presented with conflicting expert evidence, the fact-finder may accept or reject all or parts of the opinions offered. See, e.g., Ward v. Commonwealth, 407 Mass. 434, 438, 554 N.E.2d 25, 27 (1990); New Boston Garden Corp. v. Board of Assessors, 383 Mass. 456, 467-73, 420 N.E.2d 298, 305-308 (1891); Dewan v. Dewan, 30 Mass.App.Ct. 133, 135, 566 N.E.2d 1132, 1133, *rev.den.*, 409 Mass. 1104, 569 N.E.2d 832 (1991).

No specific degree of certitude is required for expert testimony and it may be accepted if the opinion is “reasonable” and expressed with sufficient firmness and clarity. See, e.g., Commonwealth v. Rodriguez, 437 Mass. 554, 562-63, 773 N.E.2d 946, 954 (2002); Bailey v. Cataldo Ambulance Service, Inc., 64 Mass.App.Ct. 228, 235, 832 N.E.2d 12, 11-18 (2005); Resendes v. Boston Edison Co., 38 Mass.App.Ct. 344, 352, 648, N.E.2d 757, 763,

¹ As to the latter point, the Commission’s notes that it is granted broader discretion in the admission of evidence than permitted in the Massachusetts courts. Compare G.L.c.30A, §11(2) with Department of Youth Services v. A Juvenile, 398 Mass. 516, 531, 499 N.E.2d 812, 821 (1986).

rev.den., 420 Mass. 1106, 651 N.E.2d 410 (1995). So long as the expert's opinion is sufficiently grounded in the evidence, but certain facts were unknown or mistakes were made in some of the expert's assumptions that generally goes to the weight of the evidence. Commonwealth v. DelValle, 443 Mass. 782, 792, 824 N.E.2d 830, 839 (2005); Sullivan v. First Mass. Fin. Corp., 409 Mass. 783, 79-92, 569 N.E.2d 814, 819-20 (1991). However, "it is also a familiar principle that testimony may not rest wholly on conjecture, and that is no less the case when the conjecture flows from the mouth of an expert. [Citations] Qualification as an expert does not confer a license to spout nonsense." Fourth Street Pub, Inc. v. National Union Fire Ins. Co., 28 Mass.App.Ct. 157, 547 N.E.2d 935, 939 (1989) (Kass.J., dissenting), rev.den., 406 Mass. 1104, 550 N.E.2d 396 (1990). See also Board of Assessors v. Odgen Suffolk Downs, 398 Mass. 604, 606-607, 499 N.E.2d 1200, 1202-1203 (1986) (expert testimony stricken which blatantly overlooked critical facts). See also: (impartial medical examiner's opinion (IME) found in part to be unsupported by admissible evidence in the record of hearing at DIA), Thomas Brommage's Case 75 Mass. App. Ct. 825 (2009).

In the case at bar, I find that it is a very close call on the evidence in the record. However, the turning point is the psychological and expert evidence; including the testimony of Dr. Reade which decides this appeal. The BPD appears to have followed its approved psychological screening plan. The BPD submitted sufficient qualified psychological or expert evidence, of sufficient weight to support its determination that the Appellant was psychologically unfit to be a Boston police officer. Conversely, the Appellant did not submit sufficient qualified psychological or expert evidence to either rebut or offset the BPD's determination to bypass him based on psychological unfitness.

The BPD has sustained its burden of proving that it was reasonably justified in bypassing Appellant Keison Harry for appointment as a Boston police officer. The BPD appears to have followed its HRD approved psychological screening plan. “[T]he goal of the... psychological screening process is to identify candidates who may exhibit *any evidence of a mental disorder*.... This process will be used to detect through a review of the background investigation, personal history as provided by the candidate, psychological testing, interviews, and *any psychological or behavior characteristics*, which would significantly interfere with the candidate’s successful performance of the essential functions and duties of the position of Boston Police Officer.”

As testified to by Dr. Julia Reade, the Department’s psychological screening process is in place because a Boston police officer position is a complicated job, a high stakes job, that requires autonomy, the ability to get along well with others, adjust to difficult circumstances, review and be accountable for your own behaviors, adjust to a hierarchal structure, be flexible, deal with very high levels of stress and deal with high levels of boredom. She also testified that the psychological screening process is important to protect the safety of the general public, the safety of the police officer himself, the safety of their partner(s), and the reputation of the Department.

The Department followed its HRD approved psychological screening plan.

“[T]he goal of the... psychological screening process is to identify candidates who may exhibit *any evidence of a mental disorder*.... This process will be used to detect through a review of the background investigation, personal history as provided by the candidate, psychological testing, interviews, and *any psychological or behavior characteristics*, which would significantly interfere with the candidate’s successful performance of the essential functions and duties of the position of Boston Police Officer.”

Every potential Boston police recruit that has been given a conditional offer of employment, including the Appellant, must take the MMPI-2 and PAI exams, meet with a first level psychiatric screener, and if he is given an unfavorable first opinion, is then referred to the Department's second level psychological screener. As was indicated in the MMPI-2 results, the Appellant endorsed critical items suggesting possible rigidity and inflexibility in his thinking, an unusual sensitivity to criticism, and he has a tendency toward somatization, which is a condition whereby mental problems tend to manifest themselves physically. The PAI results indicated that Mr. Harry may suffer from paranoia, and stress. He also endorsed critical items relating to anger and impatience, and problems with his partnership. After undergoing the testing, the Appellant was sent for an evaluation with Dr. Marcia Scott, the first level screener. After a review of the Appellant's test results and background information, Dr. Scott undertook a clinical evaluation with the Appellant. Dr. Scott made notes of her observations, conversations and psychological conclusions resulting from that evaluation.

Despite any concerns or problems that were found with Dr. Scott's interview and report and the little weight given to it; she fulfilled an integral part of the BPD's approved screening plan. Therefore the BPD and Dr. Reade had a right to reasonably rely on Dr. Scott's report in that screening process.

In conclusion, Dr. Scott found the Appellant to be irritable, agitated, overburdened self-absorbed and copes with longstanding patterns of irresponsibility and blaming. She found he had difficulty focusing or thinking through problems and responded impulsively. According to Dr. Scott, all these personality traits would interfere with the Appellant's

ability to make the assessments and judgments necessary to train for and perform the duties of an armed police officer.

Since the Appellant failed Dr. Scott's evaluation he was referred to Dr. Reade to undergo a Second Opinion Psychiatric Review, pursuant Phase III of the Boston Police Department psychological screening plan. Prior the interview, Dr. Reade reviewed some of the Appellant's background information, including: his recruit investigation summary report, personal data questionnaire, his MMPI-2 test results and analysis, his PAI test results and analysis and Dr. Marcia Scott's report of unfavorable opinion with the Appellant.

Dr. Reade reviewed his PAI and MMPI-2 scores. She found that he had defensive responses therefore likely suppressed his clinical scales. The content levels noted in the MMPI-2 demonstrate his rigidity, inflexibility and an unusual sensitivity to criticism. Additionally, Mr. Harry endorsed items in the test demonstrating acute anxiety, anti-social attitudes, sexual concern, depression, sleep disturbance and untrusting nature among other items.

Dr. Reade reviewed the PAI scores and found that Mr. Harry responded to these questions more openly. He endorsed critical items in three areas: somatization, where he converts stress into physical symptoms; paranoia, with feelings of resentment about his situation in life, and; stress. Mr. Harry's PAI scores also indicated that he could suffer from anger, impatience, problems with his relationship, stress and anxiety.

In her interview with Mr. Harry, Dr. Reade reported that Mr. Harry made "little eye contact and appeared irritable and self-justifying. Dr. Reade claimed that his presentation

in the interview, taken with the totality of the data she reviewed, supported her opinion that he was psychologically unfit to be a Boston police officer.

Acknowledgment is made of a recent decision *City of Beverly* (cited below) by the Appeals Court. The *City of Beverly* decision addressed the standard of review employed by the commission for cases involving the bypass for hiring a candidate for a civil service police officer position. The Court's decision also addressed the issues of burden of proof and proper exercise of judgment incumbent upon the appointing authority in these hiring matters. The candidate there, Bell, was bypassed for appointment based on an allegation of misconduct which led to him being fired by a prior employer. The alleged misconduct by the prior employer was: "intentionally accessing the private voicemail system of another person is a serious confidentiality breach, an invasion of the privacy of other employees, as well as potentially a violation of the law." See *City of Beverly v. Civil Service Commission & another*. 78 Mass. App. Ct. 182 (2010), Appeals Court (No. 9-P-1959), Essex county, October 28, 2010. There the Appeals Court found "A Superior Court judge vacated the commission's ruling after concluding that the commission had improperly substituted its judgment for that of the city, and Bell appealed. We affirm. [FN4]" *id* page 183.

The *City of Beverly* decision further stated: "although it is plain that the finding of facts is the province of the commission, not the appointing authority, the commission owes substantial deference to the appointing authority's exercise of judgment in determining whether there was "reasonable justification" shown. [FN11]² Such deference is especially appropriate with respect to the hiring of police officers. In light of the high standards to

² "FN11 As demonstrated below, this case well illustrates the difficulties inherent in sorting out what is fact finding (the province of the commission) and what is the exercise of judgment with regard to the facts (the province of the appointing authority)."

which police officers appropriately held, [FN12] appointing authorities are given significant latitude in screening candidates, and “[p]rior misconduct has frequently been a ground for not hiring or retaining a police officer.” Cambridge v. Civil Serv. Comm., 43 Mass. App. Ct. at 305, and cases cited.” *City of Beverly* at page 188. And the Appeals Court also stated: “Instead of focusing on whether the city had carried its burden of demonstrating a “reasonable justification,” the commission focused on whether the city had proven that Bell in fact engaged in the misconduct. We believe the commission erred as a matter of law in placing an added evidentiary burden on the city. In simple terms, neither Bell nor the commission has presented a convincing argument that the Legislature intended to force an appointing authority to hire a job applicant for such a sensitive position unless it is to prove to the commission’s satisfaction that the applicant in fact engaged in the serious alleged misconduct for which he was fired. [FN15]” *id* at page 190 And further stated: “Absent proof that the city acted unreasonably, we believe that the commission is bound to defer to the city’s exercise of its judgment.” *id* at page 191 And further elaborated: the [commission] “...ultimately rested their ruling on the city’s failure to prove that the allegations of misconduct were in fact true, a burden that we have concluded the commission erroneously assigned to the city. [FN17]” *id* at page 192. The Appeals court concluded: “In sum, we agree with the judge below that the city demonstrated a reasonable justification to bypass Bell and that the commission improperly substituted its judgment for that of the city in ordering that he be hired.” *id* at page 192

The BPD in this case at bar appeared to follow its approved psychological screening plan. It utilized well accepted written psychological tests. It employed very experienced and well credentialed Psychiatrists to conduct the two levels of

interview/evaluations. Those two Psychiatrists described concerns and formulated opinions in general conformity with the relevant statutory medical standards and the approved BPD Plan. Their concerns and opinions were expressed with reference to past historical events and the Appellant's presentation at the interviews. The Beverly decision generally affords the appointing authority "significant latitude" in the decisions of hiring police officers, which latitude is unfettered by the burden of proving the actual truth of alleged bypass reasons. The Appeals Court in Beverly further stated that the Commission owes "substantial deference" to the appointing authority's exercise of judgment in determining whether there was "reasonable justification" shown. The Appeals Court recognized that hiring a police officer applicant under certain circumstances posed a risk and that the appointing authority rightly held the prerogative of whether to take such a risk. The Beverly Court concluded that "Absent proof that the City acted unreasonably, we believe that the Commission is bound to defer to the City's exercise of its judgment." It would seem that in the context of a psychological bypass, the appointing authority's prerogative is even more ensconced and less easily assailed by the bypassed applicant. Two written psychological tests were administered to the Appellant. Thereafter two Psychiatrists conducted separate evaluation interviews incorporating their analysis of those test results in their evaluations. Although this hearing officer had some problems with Dr. Scott's first level interview and evaluation; the Appellant was sent on to Dr. Reade for a second level interview and evaluation. The BPD's determination of the Appellant's psychological unfitness ultimately rested on Dr. Reade's opinion. Dr. Reade testified here and was subject to cross-examination. Dr. Reade did express some indefiniteness, and made some concessions during cross-examination. However, despite her concessions and

indefiniteness during cross-examination; she testified at the conclusion that **she continued to hold to her opinion as stated in her report, that the Appellant did have a pattern of behavior or longstanding psychological traits which rendered him unfit to be a Boston police officer.** This expert opinion of unfitness was founded on at least some historical facts, psychological testing and analysis and the Appellant's interview presentation. The Appellant failed to submit sufficient qualified psychological evidence of sufficient weight, including any qualified expert opinion evidence to rebut Dr. Reade's opinion of unfitness. In this case at bar, the Appellant did not effectively rebut or refute the psychological evidence against him to meet the burden of production of the evidence in the record. Some competent and qualified expert psychological testimony and/or evidence with sufficient weight is needed to show the Department's psychological evaluation was not reasonably justified; and to meet the burden of submitting a preponderance of credible evidence in the record.

On the evidence presented here, the BPD has met its burden; showing by a preponderance of the credible evidence in the record that it had reasonable justification to bypass the Appellant for appointment as a police officer.

For all the above reasons, the Appeal under Docket No. G1- 07-310 is hereby ***dismissed.***


Civil Service Commission,



Daniel M. Henderson
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, McDowell, Stein and Marquis, Commissioners) on January 27, 2011.

A true record. Attest:



Commissioner

**Commissioner Marquis was
absent on January 27, 2011**

Either party may file a motion for reconsideration within ten days of the receipt of a Commission order or decision. The motion must identify a clerical or mechanical error in the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of such order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of the Commission's order or decision.

Notice:

Kristina Racek Pechulis, Atty.

Anthony R. Ellison, Atty.

John Marra, Atty. - HRD